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D. Brent Marshall  
*University of Kentucky*

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# Relief to Subsequent Home Purchasers in Kentucky: The Past, Present, Future, and *Franz*

BY D. BRENT MARSHALL\*

## INTRODUCTION

**P**icture if you will: Adam and Bert have recently bought homes next door to each other. Both have worked long and hard to save enough money for down payments, and like most Americans, these purchases are the most significant purchases of their lives.<sup>1</sup> Adam bought his newly constructed home from a developer, Carl's Construction. Bert bought his house from a couple who had also purchased their newly constructed home from Carl's Construction around the same time Adam's was built. Neither Adam nor Bert are builders by trade, and in fact both know very little about the construction of a house. Not long after both Adam and Bert moved into their respective homes, both discovered major problems in the construction of their basements. It seemed that every time it rained, both basements filled with water.

Historically, neither Adam nor Bert could recover damages from Carl in the absence of an express warranty in the contract of sale or deed.<sup>2</sup> In the middle of this century, as consumer expectations changed in the face of progressive warranty laws regarding the sale of chattels, the courts began to allow home purchasers to maintain causes of action against builders.<sup>3</sup> Within the last twenty years, the majority of jurisdictions has also elected to give relief to subsequent purchasers, realizing that both original and subsequent purchasers are essentially in the same position.<sup>4</sup>

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\* J.D. expected 1997, University of Kentucky College of Law; B.A. 1994, Duke University.

<sup>1</sup> See *Petersen v Hubschman Constr. Co.*, 389 N.E.2d 1154, 1158 (Ill. 1979) (discussing the significance of the purchase of a home).

<sup>2</sup> See *infra* note 20 and accompanying text.

<sup>3</sup> See *infra* notes 24-39 and accompanying text.

<sup>4</sup> See *infra* notes 40-95 and accompanying text.

In October of 1994, in the case of *Real Estate Marketing, Inc. v. Franz*,<sup>5</sup> the Supreme Court of Kentucky was given the opportunity to join the majority and afford a remedy to a subsequent purchaser of a home. This Note will look at the facts of the *Franz* case,<sup>6</sup> examine the history and current status of the many different remedies available to subsequent purchasers from which the *Franz* court had to choose,<sup>7</sup> discuss the avenue Kentucky ultimately took in the *Franz* case,<sup>8</sup> and analyze the *Franz* decision and its impact on home buyers in Kentucky.<sup>9</sup>

I. *REAL ESTATE MARKETING, INC. v. FRANZ*.  
JUST THE FACTS

First Lexington<sup>10</sup> built and sold a house to the Careys on September 1, 1985. Four years later, the Careys sold the same house to the plaintiffs, Michael and Kim Franz. While the Careys still owned the house, they complained to First Lexington about several problems with the house, including moisture around the front foyer and uneven flooring. Following arbitration proceedings pursuant to an insurance policy issued on behalf of First Lexington by the Homeowner's Warranty Corporation and the Homeowner's Warranty Insurance Corporation, First Lexington did some repair work on the house. Additional problems with the house followed, including "a slight separation of the chimney from the house."<sup>11</sup> The Careys were forced to deal with these problems themselves, however, as a second claim under the homeowner's warranty was denied.<sup>12</sup>

To rid themselves of the house and its problems, the Careys sold the home to the Franzes.<sup>13</sup> Soon after moving into the home, the Franzes "began experiencing problems of their own, including water leaking into

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<sup>5</sup> *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921 (Ky. 1994).

<sup>6</sup> See *infra* notes 10-16 and accompanying text.

<sup>7</sup> See *infra* notes 17-95 and accompanying text.

<sup>8</sup> See *infra* notes 96-112 and accompanying text.

<sup>9</sup> See *infra* notes 113-16 and accompanying text.

<sup>10</sup> *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921, 923 (Ky. 1994). The named defendants in the case were Real Estate Marketing, Inc. and Robert T. Mayes, f/d/b/a First Lexington Company. For the purposes of this Note, the defendant will be referred to as "First Lexington."

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* The duty of the Careys to disclose defects in the home was not addressed by the *Franz* court, and discussion of whether such a duty exists, or should exist, is beyond the scope of this Note.

the front hallway, warping of the parquet and linoleum flooring, and mold and mildew.”<sup>14</sup> The Franzes claimed the defects in the house were the result of “improper construction and poor workmanship of the builder, First Lexington, in violation of the building code in force by application of statute and local ordinance.”<sup>15</sup>

In its defense, First Lexington responded that the Lexington-Fayette Urban County Government’s Division of Building Inspection granted First Lexington a Certificate of Occupancy on September 4, 1985. The builders claimed that the Certificate of Occupancy was issued “upon a finding that construction complied with the applicable building code” and, therefore, they were not liable to the Franzes.<sup>16</sup> Given the parties’ positions, it was then for the courts of Kentucky to voice their opinion on one of the most highly debated issues in modern law. What relief, if any, should the subsequent purchasers of a home be given against the builder?

## II. A HISTORY OF THE CAUSES OF ACTION AVAILABLE TO HOME BUYERS

While the debate in the field of real estate today is whether to give subsequent purchasers a cause of action against the builder<sup>17</sup> of their home<sup>18</sup> for latent defects,<sup>19</sup> there was a time when even the original purchaser did not have such a cause of action. For centuries, the law of caveat emptor governed the sale of both personal and real property, and under that regime, in the absence of fraud or an express warranty, a cause

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> For purposes of this Note, a “builder” is a builder-vendor, or one who is in the business of building houses upon land owned by the builder-vendor and who then sells the homes together with the lots to the public. This arrangement is distinguished from a builder who is privately contracted by a landowner to build a home on the landowner’s lot.

<sup>18</sup> For purposes of this Note, “home” or “house” refers to a dwelling permanently constructed on real property. For products liability cases involving trailers or mobile homes, see generally Joel E. Smith, Annotation, *Products Liability: Liability for Injury or Death Allegedly Caused by Defect in Mobile Home or Trailer*, 81 A.L.R.3d 421 (1977).

<sup>19</sup> For purposes of this Note, it is assumed that all defects for which an initial or subsequent purchaser of a home may have a cause of action are latent defects. Cases in which courts have expressly stated that the alleged defect was obvious or patent are beyond the scope of this Note.

of action for latent defects could not be sustained.<sup>20</sup> In time, due to changing markets and consumer expectations, the courts abandoned the doctrine of caveat emptor in transactions involving the sale of chattels<sup>21</sup> and the courts began to move toward allowing a cause of action.<sup>22</sup> The implied warranty became part of the Uniform Commercial Code and the Uniform Sales Act,<sup>23</sup> both of which firmly established relief from the inequities of caveat emptor in the sale of chattels.

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<sup>20</sup> Linda M. Libertucci, Comment, *Builder's Liability to New and Subsequent Purchasers*, 20 SW. U. L. REV. 219, 220 (1991). The doctrine of caveat emptor first appeared in English law in 1603 in the case of *Chandelor v. Lopus*, 79 Eng. Rep. 3 (K.B. 1603) (in which a merchant was sued for selling a worthless rock which he claimed was a valuable jewel). The doctrine was widely used by American jurisdictions after the American Revolution, and, in 1870, the Supreme Court recognized the universal use of the doctrine in *Barnard v. Kellogg*, 77 U.S. (10 Wall.) 383 (1870) (in which the sale of wool in bales was allowed even though only a small sample of the bales had been inspected). As one commentator noted, the rationale behind applying the doctrine to real property was that home purchasers had the same "ability, means and opportunity to inspect the [home] in a manner equal to the seller." *Id.* As a result, in the absence of any express warranties or fraud, the buyer was unable to maintain a cause of action against the seller or builder. With the buyer's acceptance of the deed, the contractual relationship between the parties had terminated and the rights of the parties were limited to the specific language of the deed itself.

The often-quoted court in *Osborne v. Howard*, 242 S.W. 852 (Ky. 1922) firmly established Kentucky's stance on the doctrine of caveat emptor by stating:

It is an ancient rule inherited from the common law, and well established in our jurisprudence, that in land deals the rule of caveat emptor applies, and it is only relaxed when it is shown that the vendor does something to prevent the prospective purchaser from making a thorough examination of the premises to ascertain its nature and value, or when the property, which is the subject of the sale, lies at great distance from the parties to the trade, and the purchaser has no reasonable opportunity to visit and examine it.

*Id.* at 853.

<sup>21</sup> WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 636 (4th ed. 1971).

<sup>22</sup> This movement began with the case of *Holcombe v. Hewson*, 170 Eng. Rep. 1194 (1810). The court in that case recognized the need for chattels to be of fair merchantable quality and chose to impose a warranty against inferior products even though the parties themselves had not expressly created one.

<sup>23</sup> Lloyd E. Ferguson, Note, *Gupta v. Ritter Homes, Inc.: Extending the Implied Warranty of Habitability to Subsequent Purchasers — An Honorable Result Based on Unsound Theory*, 35 BAYLOR L. REV. 670, 673 (1983).

With much reluctance, the state courts began to apply implied warranties to the sale of real property. The trend began in 1957 with the landmark Ohio case of *Vanderschrier v. Aaron*,<sup>24</sup> in which the court found an implied warranty by the builder of a home that the dwelling was fit for human habitation.<sup>25</sup> The application of the implied warranty of habitability to the sale of newly constructed homes began because the nature of buying a home had evolved to become much like the process of purchasing chattels. Courts for centuries had justified the use of caveat emptor in the sale of real property by claiming that both parties to the sale of a home were of equal bargaining position, skill, and experience.<sup>26</sup> These justifications simply do not hold true today.<sup>27</sup> After the Second World War, the housing market skyrocketed. Poor craftsmanship was an inevitable result of the increase in demand and subsequent rush to construct postwar housing. Purchasers of new homes, who for years had relied on implied warranties of merchantability when purchasing their personal items, flooded the courts seeking similar relief against the builders of their defective homes.<sup>28</sup> In response to the changing market and public demands, the courts began to move away from caveat emptor. This opportunity for change was summed up recently by one commentator:

In today's world of mass production and specialization, the home purchaser simply cannot be expected to have the detailed knowledge of homes acquired by those in the business. Now the purchaser relies on the expertise of the builder-vendor. The modern purchaser usually has neither the time nor the money to hire experts to check a home for latent defects. The builder would be unjustly rewarded if his knowledge and expertise in building sound and secure homes with no hidden defects was imputed to the ordinary consumer.<sup>29</sup>

The roots of the causes of action for the home buyer, therefore, lie in public policy. The purchaser of a new home today is in essentially the

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<sup>24</sup> *Vanderschrier v. Aaron*, 140 N.E.2d 819 (Ohio 1957).

<sup>25</sup> See generally Robert L. Cherry, Jr., *Builder Liability for Used Home Defects*, 18 REAL EST. L.J. 115 (1989).

<sup>26</sup> Joseph C. Brown, Jr., *The Implied Warranty of Habitability Doctrine in Residential Property Conveyances: Policy-Backed Change Proposals*, 62 WASH. L. REV. 743, 743 (1987).

<sup>27</sup> Libertucci, *supra* note 20, at 222.

<sup>28</sup> Brown, *supra* note 26, at 744.

<sup>29</sup> Libertucci, *supra* note 20, at 220-21.

same situation as is the purchaser of chattel, and the courts have long recognized causes of action for the latter category.<sup>30</sup> Purchasers of new homes have a right to believe they are buying homes free of defects, and courts have become increasingly sympathetic to the plight of the home buyer. This sympathy has furthered the development of the doctrine, the scope and application of which "seems to be limited only by the ingenuity of plaintiffs and the forbearance of the courts."<sup>31</sup>

With the increasing acceptance of implied warranties, initial purchasers of homes can now rely on a builder's good faith and skill.<sup>32</sup> Courts have justified this "buyer reliance" because buyers have the expectations of a consumer and are not accustomed to acting in a caveat emptor world.<sup>33</sup> Consumers are accustomed to buying "goods [with] minimum implied warranties attached."<sup>34</sup> Consumers are accustomed to "getting what they paid for."<sup>35</sup> Courts honor these expectations because buyers of new houses have no reason for believing that the particular purchase should be treated differently from any other purchase.<sup>36</sup> In fact, for most buyers, the purchase of a house is the single biggest purchase of their lives.<sup>37</sup> It is easy to see why the courts allow purchasers of new homes to believe they are protected. Today, the vast majority of states,<sup>38</sup>

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<sup>30</sup> See *supra* note 21 and accompanying text.

<sup>31</sup> David L. Abney, *Determining Damages for Breach of Implied Warranties in Construction Defect Cases*, 16 REAL EST. L.J. 210, 210 (1988).

<sup>32</sup> Libertucci, *supra* note 20, at 223. See, e.g., *Petersen v. Hubschman Constr. Co.*, 389 N.E.2d 1154, 1158 (Ill. 1979) (in buying a new home, there is a "dependent relationship of the vendee to the vendor").

<sup>33</sup> Brown, *supra* note 26, at 747; see also Leo Bearman, Jr., *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 549-52 (1961).

<sup>34</sup> Brown, *supra* note 26, at 747

<sup>35</sup> *Id.* (quoting E.F. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 835-36 (1967)).

<sup>36</sup> *Id.*

<sup>37</sup> *Petersen v. Hubschman Constr. Co.*, 389 N.E.2d 1154, 1158 (Ill. 1979).

<sup>38</sup> Cherry, *supra* note 25, at 115. The implied warranty of habitability was first established in Kentucky in 1969 in the case of *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. 1969). In that case, Dan Terhune and his wife purchased a new house from Robert Crawley, Sr., the builder. Title was transferred and several months after moving into the home, the Terhunes discovered that rain water would come through the walls of the basement and would not drain out. The Terhunes sued the builder based on a claim of breach of an implied warranty of habitability. At trial, the jury entered a verdict for the Terhunes. *Id.* at 744. In the Terhunes' claim against the builder, evidence was submitted showing that

including Kentucky, allow initial purchasers of homes a cause of action for latent defects.<sup>39</sup>

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“the basement walls were not so constructed as to withstand surface water pressure, being of concrete block with no coating or sealing; there was an absence of drain tile around the outside of the house; and the basement floor did not have proper drainage facilities.” *Id.* at 745. In addition, expert testimony from an architect and an engineer established that the “construction did not conform to accepted practices and standards.” *Id.* The court reasoned that if Kentucky were to have a cause of action based on the implied warranty of habitability, the facts of *Terhune* would certainly yield relief under such a doctrine. Hence, in a brief opinion, the court applied the implied warranty to the sale of a home by a builder to an initial purchaser.

At the time, the majority rule among the states was that there was no such implied warranty in the sale of a home. The court in *Terhune* recognized this fact and instead chose to follow the growing number of states who followed the minority rule. In giving its reasons for following the minority rule, the court in *Terhune* stated:

Because the caveat emptor rule is completely unrealistic and inequitable as applied in the case of the ordinary inexperienced buyer of a new house from the professional builder-seller, and because a contract by the builder to sell a new house is not much distinguishable from a contract to build a house for another, we are disposed to adopt the minority view to the extent of holding that in the sale of a new dwelling by the builder there is an implied warranty that in its major structural features the dwelling was constructed in a workmanlike manner and using suitable materials.

*Id.*

<sup>39</sup> For cases outside of Kentucky which allow for an initial purchaser of a home to recover for latent defects based on a suit for negligent construction, see *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427 (Ariz. 1984); *Murphy v. Sheftel*, 9 P.2d 568 (Cal. Ct. App. 1932); *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041 (Colo. 1983); *Caporaletti v. A-F Corp.*, 137 F. Supp. 14 (D.C. D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957); *Gatwood v. McGee*, 475 So. 2d 720 (Fla. Dist. Ct. App. 1985); *Williams v. Rumion*, 325 S.E.2d 441 (Ga. Ct. App. 1984); *Mincy v. Crisler*, 96 So. 162 (Miss. 1923); *Ked-Wick Corp. v. Levinton*, 681 S.W.2d 851 (Tex. App. 1984); *Oremus v. Wynhoff*, 123 N.W.2d 441 (Wis. 1963). For cases outside of Kentucky which allow an initial purchaser of a home to recover for latent defects based on some type of implied warranty, see *F & S Constr. Co. v. Berube*, 322 F.2d 782 (10th Cir. 1963); *Crocker v. Reed*, 420 So. 2d 285 (Ala. Civ. App. 1982); *Woodward v. Chirco Constr. Co., Inc.*, 687 P.2d 1269 (Ariz. 1984); *Pickler v. Fisher*, 644 S.W.2d 644 (Ark. Ct. App. 1983); *Pollard v. Saxe & Yolles Dev. Co.*, 525 P.2d 88 (Cal. 1974); *Bethlahmy v. Bechtel*, 415 P.2d 698 (Idaho 1966); *Weck v. A:M*



Just as public policy demands a cause of action for an initial purchaser against a builder, the same public policy also demands a cause of action for subsequent purchasers. Within the last twenty years, states have begun to recognize causes of action for the subsequent purchaser against the builder of the home.<sup>40</sup> Today, subsequent purchasers are given causes of action in negligence,<sup>41</sup> the extension of the implied warranty of habitability,<sup>42</sup> and most recently, strict liability<sup>43</sup>

### A. Negligence

One of the earliest requirements for a cause of action against the builder of a home was contractual privity "Like the doctrine of *caveat emptor*, the requirement of contractual privity began in England."<sup>44</sup> In the case of *Winterbottom v. Wright*<sup>45</sup> in 1842, the court expressed concern that a defendant may be subject to liability from an unlimited number of plaintiffs. Therefore, contractual privity was established to prevent situations in which there would be "no point at which such

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Sunrise Constr. Co., 184 N.E.2d 728 (Ill. App. Ct. 1962); *Theis v Heuer*, 280 N.E.2d 300 (Ind. 1972); *Kirk v. Ridgway*, 373 N.W.2d 491 (Iowa 1985); *Loch Hill Constr. Co. v. Fricke*, 399 A.2d 883 (Md. 1979); *Allison v Home Sav Ass'n*, 643 S.W.2d 847 (Mo. Ct. App. 1982); *Chandler v Madsen*, 642 P.2d 1028 (Mont. 1982); *Norton v Burleaud*, 342 A.2d 629 (N.H. 1975); *Schipper v Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965); *De Roche v. Dame*, 430 N.Y.S. 2d 390 (N.Y. App. Div. 1980); *Griffin v. Wheeler-Leonard & Co., Inc.*, 225 S.E.2d 557 (N.C. 1976); *Rutledge v Dodenhoff*, 175 S.E.2d 792 (S.C. 1970); *Waggoner v Midwestern Dev., Inc.*, 154 N.W.2d 803 (S.D. 1967); *Humber v Morton*, 426 S.W.2d 554 (Tex. 1968); *Bolkum v Staab*, 346 A.2d 210 (Vt. 1975); *Klos v Gockel*, 554 P.2d 1349 (Wash. 1976); *Tavares v Horstman*, 542 P.2d 1275 (Wyo. 1975). For an example of a case which allows an initial purchaser of a home to recover for latent defects based on strict liability, see *State Stove Mfg. Co. v Hodges*, 189 So. 2d 113 (Miss. 1966). *But see Natri v Wood Bros. Homes, Inc.*, 690 P.2d 158 (Ariz. Ct. App. 1984).

<sup>40</sup> Cherry, *supra* note 25, at 115.

<sup>41</sup> See *infra* notes 44-66 and accompanying text.

<sup>42</sup> Cherry, *supra* note 25, at 115. See *infra* notes 67-83 and accompanying text.

<sup>43</sup> See *infra* notes 84-95 and accompanying text.

<sup>44</sup> Connie S. Granata, Note, *From Buyer Beware to Builder Beware — The Subsequent Purchaser's Cause of Action Against the Builder*, 11 AM. J. TRIAL ADVOC. 143, 145 (1987).

<sup>45</sup> *Winterbottom v Wright*, 152 Eng. Rep. 402 (Ex. 1842).

actions would stop.”<sup>46</sup> The requirement of privity was first dropped in negligence actions involving personal property,<sup>47</sup> and eventually courts began loosening the requirement in actions involving real property.<sup>48</sup>

One of the first cases to drop the privity requirement and allow subsequent purchasers of homes to bring a cause of action against the builder was *Coburn v. Lenox Homes, Inc.*,<sup>49</sup> decided by the Supreme Court of Connecticut in 1977. In that case, the plaintiffs purchased a home from a seller who had the home constructed by the defendant builder. After the plaintiffs moved into the home, the septic system, which had originally been installed by the builder, failed. The court allowed the plaintiffs to recover on their theory of negligence in spite of the absence of privity of contract, stating that “[t]he fact that we are dealing here with a suit by a subsequent purchaser is not fatal to the negligence claim since the requirement of privity should only be applicable to actions growing out of contract theory and should be irrelevant to tort actions.”<sup>50</sup>

A more recent case which allowed recovery for a subsequent purchaser based on negligence is *Oates v. JAG, Inc.*<sup>51</sup> In that case, the Oates, as subsequent purchasers, bought a house from a seller which had been constructed by the defendant, JAG, Inc.<sup>52</sup> After moving into the home, the Oates, according to the allegations in their complaint, “discovered numerous defects, faulty workmanship, and negligent construction of the residence.”<sup>53</sup> Like the *Coburn* court, the North

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<sup>46</sup> Granata, *supra* note 44, at 145.

<sup>47</sup> Privity of contract was first relaxed in 1916 to give a subsequent purchaser of non-real property a cause of action for negligence in the seminal case of *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). In that case, Justice Cardozo held that although the purchaser of an automobile did not purchase the automobile directly from the defendant, the plaintiff could still sue the defendant for negligence. *Id.* Since the decision in *MacPherson*, courts have been eliminating the privity requirement in negligence actions. In the majority of states today, the rule is “that where a person undertakes to do an act or discharge a duty, liability for negligence in the breach of this duty is in no way dependent on the existence of any privity of contract between the person guilty of the negligence and the person suffering an injury as a result thereof.” Cherry, *supra* note 25, at 118.

<sup>48</sup> Cherry, *supra* note 25, at 118.

<sup>49</sup> *Coburn v. Lenox Homes, Inc.*, 378 A.2d 599 (Conn. 1977).

<sup>50</sup> *Id.* at 602.

<sup>51</sup> *Oates v. JAG, Inc.*, 333 S.E.2d 222 (N.C. 1985).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 224 (These include “the installation of a drain pipe which had been

Carolina Supreme Court in *Oates* declared that an action in negligence is not affected by the absence of privity. The court in *Oates* adopted the rule from another jurisdiction that "[t]he absence of contractual privity between plaintiff and defendant does not affect plaintiff's tort claim, provided plaintiff can establish the existence of a duty between the parties, and defendant's breach of such duty, with the proximate result that plaintiff suffered the damages of which it complains."<sup>54</sup>

Due to the relaxation of the privity requirement, many courts today allow subsequent purchasers of homes to recover damages for latent defects in their homes through a negligence cause of action.<sup>55</sup> From the builder's point of view, it is this cause of action that subjects the builder to the most potential liability.<sup>56</sup> "This is due to the expansive pool of potential plaintiffs, including anyone within the areas of foreseeable risk (such as original and subsequent purchasers, adjacent property owners, homeowner associations, lenders, etc.)."<sup>57</sup> An additional factor, which opens builders up to great potential liability under negligence claims, is that many jurisdictions which allow such a cause of action also follow the discovery rule.<sup>58</sup> The discovery rule states that a plaintiff's cause of action does not accrue until the plaintiff knew or should have known of the defect. This rule potentially subjects a builder to liability from purchasers for many years after construction is completed.<sup>59</sup>

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cut, the failure to use grade-marked lumber, the failure to comply with specific provisions of the North Carolina Uniform Residential Building Code pertaining to certain weight bearing requirements, improper and insufficient nailing on bridging and beams, and faulty and shoddy workmanship.").

<sup>54</sup> *Id.* at 225 (quoting *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So. 2d 689, 691 (Fla. Dist. Ct. App. 1979)).

<sup>55</sup> See *Kriegler v. Eichler Homes Inc.*, 74 Cal. Rptr. 749 (Cal. Dist. Ct. App. 1969); *Wright v. Creative Corp.*, 498 P.2d 1179 (Colo. Ct. App. 1972); *Coburn v. Lenox Homes, Inc.*, 378 A.2d 599 (Conn. 1977); *Simmons v. Owens*, 363 So. 2d 42 (Fla. Dist. Ct. App. 1978); *Leigh v. Wadsworth*, 361 P.2d 849 (Okla. 1961); *Terlinde v. Neely*, 271 S.E.2d 768 (S.C. 1980); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979).

<sup>56</sup> Joseph G. Wagman & Judy H. Chen, *Liability for Defective Work — Drafting Contract Provisions From the General Contractor's Perspective*, CONSTR. LAW. 1, 32, May 1990.

<sup>57</sup> *Id.* at 32-33.

<sup>58</sup> *Id.* at 33.

<sup>59</sup> *Id.* But see *Shirkey v. Mackey*, 399 S.E.2d 868 (W. Va. 1990) (refusing to adopt the discovery rule on the grounds that it would completely defeat the ten-year statute of limitations applicable to architects and builders).

Courts that have refused to extend a cause of action based on negligence to subsequent purchasers have looked, along with privity, to the requirement of actual physical damages as opposed to allowing recovery for a mere economic loss. Economic loss has been defined as:

“damages for inadequate value, costs of repair and replacement of the defective product, or the consequent loss of profits as well as the diminution in value of the product because it is inferior in quality to recover in negligence there must be a showing of harm above and beyond disappointed expectations. A buyer’s desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects.”<sup>60</sup>

In many states allowing the economic loss defense, damages for economic loss may be obtained only through a claim of negligence if there is privity of contract.<sup>61</sup> In these states, in the absence of privity, a plaintiff may recover only the traditional negligence damages for personal injury or damage to real or personal property.<sup>62</sup> Opponents of the economic loss rule claim that “it seems capricious to deny recovery to a vigilant property owner who discovers a latent defect, which ‘only’ diminishes the value of his property, and allow recovery if he had ‘waited’ for a member of his family to be injured as a result of the defect.”<sup>63</sup>

In Kentucky, lack of privity is not a bar to recovery under a negligence action by a subsequent purchaser, but there is the requirement that there be more than economic damages. In *Saylor v. Hall*,<sup>64</sup> the court recognized that damages for negligent construction could be awarded despite the lack of privity.<sup>65</sup> However, it remains the law in Kentucky

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<sup>60</sup> *Jordan v. Talaga*, 532 N.E.2d 1174, 1181 (Ind. Ct. App. 1989) (quoting *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982)).

<sup>61</sup> See *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 859 F.2d 242, 247 (2d Cir. 1988) (under New York law “professionals are not liable either in tort or contract absent privity” for purely economic loss); *Wells v. Clowers Constr. Co.*, 476 So. 2d 105, 106 (Ala. 1985) (action for damages from negligent construction by party not in privity with the builder is barred); *Village of Cross Keys, Inc. v. U.S. Gypsum Co.*, 556 A.2d 1126 (Md. 1989) (an ultimate nexus, such as privity, is required between the parties for recovery for economic loss).

<sup>62</sup> *Wagman & Chen*, *supra* note 56, at 33.

<sup>63</sup> *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921, 926 (Ky. 1994).

<sup>64</sup> *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973).

<sup>65</sup> *Saylor* was an action for damages brought by tenants against the builder of a home for negligent construction. The tenants filed suit after a fireplace

that "tort recovery is contingent upon damage from a destructive occurrence as contrasted with economic loss related solely to diminution in value, even though, as to property damage, both may be measured by the cost of repair."<sup>66</sup>

### B. *The Implied Warranty of Habitability*

Like the cause of action based on negligence, lack of privity of contract has also been a bar to a cause of action based on the implied warranty of habitability.<sup>67</sup> Historically, courts have held that warranty law is fundamentally a product of contract. Therefore, privity, also a product of contract law, has traditionally been required for a home buyer to recover from the builder.<sup>68</sup> As was the case with privity and negligence, the requirement was first relaxed in cases involving chattels. The requirement of privity in a case brought under an implied warranty was first relaxed in the seminal case of *Henningsen v. Bloomfield Motors, Inc.*<sup>69</sup> in 1960. The court in that case rejected the privity defense in an action brought under the implied warranty of habitability by a remote purchaser of an automobile.<sup>70</sup> Eventually, courts relaxed the privity requirement in real property cases, and the current trend in state courts is to allow subsequent purchasers a cause of action against the builder based on the implied warranty of habitability despite the lack of privity.<sup>71</sup>

In addition to privity, the doctrine of merger has been used to prevent initial purchasers from recovering under implied warranties, making it

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collapsed in the home they were renting, resulting in the death of one son and injury to another. In its decision, the court discussed at length the history and decline of the privity requirement. In concluding that the requirement of privity is no longer a valid defense to a claim of negligent construction, the *Saylor* court quoted Professor William L. Prosser: "It is now the almost universal rule that the contractor [builder] is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done." *Id.* at 224 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 104, at 681 (4th ed. 1971)) (alteration in original).

<sup>66</sup> *Franz*, 885 S.W.2d at 926.

<sup>67</sup> See *supra* notes 44-47 and accompanying text.

<sup>68</sup> G. Scott Lutz, Note, *Latent Defects: Subsequent Home Purchasers Beware*, 40 S.C. L. REV. 1017, 1021 (1989).

<sup>69</sup> *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

<sup>70</sup> *Id.*

<sup>71</sup> *Cherry*, *supra* note 25 (citing *Henningsen*, 161 A.2d at 69).

virtually impossible for the subsequent purchaser to bring a cause of action against the builder.<sup>72</sup> The doctrine of merger states that all contracts signed by the parties involved in the sale of a home are merged into the deed.<sup>73</sup> Thus, unless there are express statements to the contrary appearing on the deed, the buyer cannot recover damages based on an implied warranty once the deed is conveyed.<sup>74</sup> The case of *Petersen v. Hubschman Construction Co.*<sup>75</sup> was one of the first cases to state that the doctrine of merger did not bar implied warranties. The court in that case rationalized that implied warranties arise not out of the execution of a deed, but rather stem from the agreement between the parties to the sale. In stating that the doctrine of merger is inconsistent with the policy behind the implied warranty, the court barred the merger defense.<sup>76</sup> This decision helped to remove yet another barrier to the purchaser of a new home, which in turn helped the cause of the subsequent purchaser.

Despite the many possible obstacles a subsequent purchaser potentially faces in bringing a cause of action against a builder based on the implied warranty of habitability, it is this very application which has been the subject of great debate recently both in and out of the courtroom.<sup>77</sup> Opponents of the recent movement toward giving subsequent purchasers an implied warranty in the purchase of their home rely mainly on the power of precedent and the availability of previously recognized defenses. Advocates of the extension call on the powers of public policy

In *Gupta v. Ritter Homes, Inc.*,<sup>78</sup> Texas joined the growing ranks of those states which extended the implied warranty of habitability to a subsequent purchaser.<sup>79</sup> The decision was popular with public policy advocates, and in 1983 one commentator wrote of the decision that "[b]y extending the implied warranty of habitability in this manner, the court

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<sup>72</sup> Libertucci, *supra* note 20, at 231; see *Cox v. Wilson*, 137 S.E.2d 47 (Ga. Ct. App. 1964); *Coutrakon v. Adams*, 188 N.E.2d 780 (Ill. App. Ct. 1963), *aff'd*, 201 N.E.2d 100 (Ill. 1964).

<sup>73</sup> Libertucci, *supra* note 20, at 231.

<sup>74</sup> *Id.*

<sup>75</sup> *Petersen v. Hubschman Constr. Co.*, 389 N.E.2d 1154 (Ill. 1979).

<sup>76</sup> *Id.*

<sup>77</sup> The Uniform Land Transactions Act contains a section which imposes an implied warranty of quality on the sale of new homes and improvements. UNIF. LAND TRANSACTIONS ACT (U.L.A.) § 2-309 (1986). However, no state has yet adopted this Act, which should illustrate the level of uncertainty and skepticism currently surrounding this area of the law.

<sup>78</sup> *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983).

<sup>79</sup> *Id.*

has adjusted the law so that it more closely parallels the home buying practices of our mobile society, in which people move much more frequently than they did years ago."<sup>80</sup> Another commentator has said of the debate that:

The logic which required the change in the law of personal property is equally persuasive in the law of real property. The extension of implied warranty of habitability from the original purchaser to the subsequent purchaser is based on the fact that the builder 'holds out' his expertise to the original buyer and fosters a reliance on that expertise. Such reliance is not negated simply because of lack of privity between the subsequent buyer and the builder.<sup>81</sup>

The battle to extend the doctrine has been waged inside the courtroom as well. Many arguments for the extension of the implied warranty have been looked upon favorably. One of the first states to extend an implied warranty to subsequent purchasers was Wyoming in the case of *Moxley v. Laramie Builders, Inc.*<sup>82</sup> The court in that decision made its own compelling argument for the extension by stating:

The purpose of a warranty is to protect innocent purchasers and hold builders accountable for their work. With that object in mind, any reasoning which would arbitrarily interpose a first buyer as an obstruction to someone equally as deserving of recovery is incomprehensible,

No reason has been presented to us whereby the original owner should have the benefits of an implied warranty and the next owner should not simply because there has been a transfer. Such intervening sales, standing by themselves, should not, by any standard of reasonableness, effect an end to an implied warranty upon manifestation of a defect. The builder always has available the defense that the defects are not attributable to him.<sup>83</sup>

### C. *Strict Liability*

A recent phenomenon is to give subsequent purchasers a cause of action through section 402A of the Restatement (Second) of Torts,<sup>84</sup>

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<sup>80</sup> Ferguson, *supra* note 23, at 670.

<sup>81</sup> Granata, *supra* note 44, at 149 (footnotes omitted).

<sup>82</sup> *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979).

<sup>83</sup> *Id.* at 736.

<sup>84</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

which expands the doctrine of strict liability to nearly all cases involving defective products.<sup>85</sup> Services were traditionally not covered by the doctrine and, therefore, builders, who have historically been perceived by the courts as providing a service rather than a product, were not subject to strict liability standards.<sup>86</sup> Also, land and everything permanently attached to it have been historically called real property and hence out of the reach of 402A.<sup>87</sup> Eventually, however, like with the other causes of action now available to subsequent purchasers, the comparison between the manufacturer of a product and the builder of a house opened the doors to the application of strict liability to builders.<sup>88</sup>

The application of 402A to homes developed in parallel to the extension of the implied warranty of habitability.<sup>89</sup> By applying implied warranties which have traditionally been reserved to the sale of chattels to the sale of land,<sup>90</sup> courts were paving the way, indirectly, for land to be considered a "product" within the meaning of section 402A.<sup>91</sup> Recently, courts have applied the doctrine of strict liability to give subsequent purchasers a cause of action.<sup>92</sup> For example, the Supreme Court of Arkansas, in *Blagg v. Fred Hunt Co., Inc.*,<sup>93</sup> applied the doctrine of strict liability to the sale of a house.<sup>94</sup> This gave a subsequent purchaser a cause of action against the builder, because as the court reasoned, "there are no meaningful distinctions between [the] mass production and sales of homes and the mass production and sale of automobiles."<sup>95</sup>

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<sup>85</sup> Charles E. Cantu, *The Illusive Meaning of the Term "Product" Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635, 637 (1991).

<sup>86</sup> Granata, *supra* note 44, at 151.

<sup>87</sup> Cantu, *supra* note 85, at 645.

<sup>88</sup> Granata, *supra* note 44, at 151-52.

<sup>89</sup> Cantu, *supra* note 85, at 645.

<sup>90</sup> See *supra* note 24 and accompanying text.

<sup>91</sup> The first case to actually hold that a house is a product under section 402A was *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965). After a house had been proven defective and unreasonably dangerous, the doctrine of strict liability was held to apply.

<sup>92</sup> See, e.g., *Kriegler v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749 (Cal. Dist. Ct. App. 1969); *Berman v. Watergate West, Inc.*, 391 A.2d 1351 (D.C. 1978); *Hermes v. Staiano*, 437 A.2d 925 (N.J. 1981).

<sup>93</sup> *Blagg v. Fred Hunt Co., Inc.*, 612 S.W.2d 321 (Ark. 1981).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 324 (quoting *Schipper v. Levitt and Sons, Inc.*, 207 A.2d 314 (N.J. 1965)).



#### IV KENTUCKY'S STANCE ON RELIEF TO SUBSEQUENT PURCHASERS: THE DECISION IN *FRANZ*

In the *Franz* case, plaintiffs alleged three theories of liability against the builder, First Lexington.<sup>96</sup> First, the Franzes alleged "negligence and negligence *per se* in failing to comply with various provisions of the uniform state building code."<sup>97</sup> Second, they alleged "breach of implied warranties of merchantability, fitness for particular purpose, and habitability."<sup>98</sup> Lastly, the Franzes alleged a statutory cause of action based on Kentucky Revised Statutes section 198B.130, which provides for a private action for damages:

Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this chapter or the Uniform State Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation. An award may include damages and the cost of litigation, including reasonable attorney's fees.<sup>99</sup>

The court in *Franz* first addressed the claim that First Lexington violated an implied warranty of habitability. The analysis began by recognizing that under existing Kentucky law the implied warranty of habitability does exist in the sale of a new dwelling to the initial purchaser.<sup>100</sup> The court relied on the requirement of privity, however, and refused to extend the implied warranty to subsequent purchasers, thereby reversing the decision of the lower court.<sup>101</sup> The Supreme Court

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<sup>96</sup> *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921, 923 (Ky. 1994). The plaintiffs made no attempt to recover based on strict liability.

<sup>97</sup> *Id.* See *infra* notes 104-07 and accompanying text.

<sup>98</sup> *Franz*, 885 S.W.2d at 923. See *infra* notes 100-03 and accompanying text.

<sup>99</sup> KY REV. STAT. ANN. § 198B.130 (Michie/Bobbs-Merrill 1993). See *infra* notes 108-12.

<sup>100</sup> See *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. 1969) (discussed *supra* at note 38).

<sup>101</sup> The Court of Appeals in this case held that the implied warranty of habitability should be available to subsequent purchasers in the absence of privity. That court would have given the Franzes "a cause of action for breach of an implied warranty of habitability upon proof of 'latent defects which become manifest after the subsequent owner's purchase and which were not discoverable by reasonable inspection prior to purchase.'" *Franz*, 885 S.W.2d at

refused to apply the rule proposed by the lower court, which was supported by New Hampshire law, because there was no legislation in Kentucky from which to justify a judicial public policy decision such as there was in New Hampshire.<sup>102</sup> In the absence of such legislative authority, the court refused to make law "out of whole cloth."<sup>103</sup>

The *Franz* court next addressed the issue of negligence and negligence per se. The court noted that in Kentucky damages can be awarded for negligent construction in the absence of privity.<sup>104</sup> However, the court recognized another barrier, the requirement of more than economic loss.<sup>105</sup> The court explained that plaintiffs must prove a "damaging event" to recover under negligence, but the court limited this requirement to negligence claims only.<sup>106</sup> Noting that a negligence per se claim is only a "negligence claim with a statutory standard of care substituted for

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925 (quoting *Franz v. Real Estate Marketing, Inc.*, No. 92-CA-000310-MR (Ky App. Feb. 5, 1993)). That court chose to adopt the ruling in the New Hampshire decision of *Lempke v. Dagenais*, 547 A.2d 290 (N.H. 1988). In *Lempke*, the extension of the implied warranty of habitability would be "limited to a reasonable period of time" with the burden of proof on the plaintiff to "show 'that the alleged defect was caused by the [builder's] workmanship.'" *Id.* at 297 (quoting *Barnes v. MacBrown and Co.*, 342 N.E.2d 619, 621 (Ind. 1976)). The builder's available defenses included "'that the defects were not attributable to [the builder]; that [the defects] are the result of use or ordinary wear and tear, or that previous owners have made substantial changes.'" *Id.* (quoting *Richard v. Powercraft Homes, Inc.*, 678 P.2d 427, 430 (Ariz. 1984)).

<sup>102</sup> The court in *Lempke* reached its result from what the *Franz* court calls a "broad view of public policy regarding warranties," *Franz*, 885 S.W.2d at 926, noting that the New Hampshire version of the Uniform Commercial Code ("U.C.C.") contains Alternative C, which abolishes the requirement of privity in implied warranty suits. See *Lempke*, 547 A.2d at 294. The version of the U.C.C. adopted by Kentucky did not include Alternative C. *Franz*, 885 S.W.2d at 926. The court in *Franz* admitted that while the "U.C.C. does not apply, as such, to selling a home, the New Hampshire version of the U.C.C. at least provides a source from which to extrapolate a public policy." *Id.*

<sup>103</sup> *Franz*, 885 S.W.2d at 926.

<sup>104</sup> *Id.* The court looked to *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973) in confirming that privity was not required in a negligence case. See *supra* notes 64-65.

<sup>105</sup> *Franz*, 885 S.W.2d at 926. The court here noted that "tort recovery is contingent upon damage from a destructive occurrence as contrasted with economic loss related solely to diminution in value, even though, as to property damage, both may be measured by the cost of repair." *Id.*

<sup>106</sup> *Id.*

the common law standard of care," the court held that the negligence *per se* claim based on building code violations was also barred by the requirement of a destructive occurrence.<sup>107</sup>

The court in *Franz* lastly turned its attention to the statutory cause of action based on section 198B.130.<sup>108</sup> A violation of this statute, the court noted, provides its own remedy and is not dependent on negligence *per se*.<sup>109</sup> The statute does not limit damages to those that would have been received in a tort action, therefore subjecting the claim to the destructive occurrence requirement.<sup>110</sup> Nor does the statute require privity. The court interpreted the statute as requiring the "payment of either the cost of repair to bring the property up to code compliance or payment of the diminution in fair market value of the property because of code infractions, whichever is less."<sup>111</sup> The court held that the issuance of the certificate of occupancy was not a complete defense to the action but rather, at most, rebuttable evidence that defendants complied with the building code.<sup>112</sup>

#### V IS *FRANZ* THE RIGHT ANSWER?

In terms of the evolution of the law, the most important aspect of *Franz* is that subsequent purchasers of homes in Kentucky now have a statutory cause of action against the builders of their homes for defective construction regardless of any of the classic barriers to that claim. However, as one dissenting opinion in *Franz* noted, "[n]o matter what name is attached to the right of recovery by the majority opinion, it remains an extension of the implied warranty of habitability to subsequent purchasers."<sup>113</sup>

In refusing to extend the implied warranty of habitability to subsequent purchasers in form if not deed, the court in *Franz* could find no

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<sup>107</sup> *Id.* at 927

<sup>108</sup> See *supra* note 99 and accompanying text for relevant portion of statute.

<sup>109</sup> *Franz*, 885 S.W.2d at 927

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* The court stated that "[t]o interpret the statute otherwise would render the statute meaningless because a cause of action for code violations already exists without it under the theory of negligence *per se* in KRS 446.070. We will not reduce the statute to a useless absurdity by interpreting it as merely repetitive of a right that already exists to pursue a negligence *per se* claim if a destructive event occurs as a violation of the building code." *Id.*

<sup>112</sup> *Id.* at 927-28.

<sup>113</sup> *Id.* at 928 (Wintersheimer, J., dissenting).

statutory justification for extending its rule in *Crawley*. The Supreme Court looked at the New Hampshire decision in *Lempke*, the case on which the Court of Appeals based its decision.<sup>114</sup> Because *Lempke* justified the extension of the implied warranty of habitability through a liberal Uniform Commercial Code ("U.C.C."), the court in *Franz* looked to Kentucky's U.C.C.<sup>115</sup> However, other jurisdictions have extended the implied warranty of habitability without ever mentioning the U.C.C., which leaves unanswered questions from the decision in *Franz*. Had the Court of Appeals attempted to fashion a rule using, as a model, a jurisdiction with a U.C.C. like Kentucky's instead of New Hampshire's, would the Supreme Court's decision in *Franz* be different? What if New Hampshire had rendered its decision "out of whole cloth?" Would that mean that it would be okay for Kentucky to do the same? If all the Supreme Court in *Franz* was looking for was a statutory justification to extend the implied warranty of habitability — a nod of approval from the legislature — why didn't it simply look at the very statute it ultimately used to give the plaintiff relief? Section 198B.130 states "[n]otwithstanding any other remedies available," which certainly seems to indicate legislative approval for an extension of the implied warranty

In choosing to provide relief under the statutory cause of action, the court did so to give the statute a purpose, or in the court's words, to rescue the statute from "useless absurdity."<sup>116</sup> The court feared that if it extended the implied warranty or gave relief for pure economic loss based on negligence, the statute would be redundant. However, there is nothing extraordinary about a statute that reaffirms a judicially created doctrine. A perfect example, and one that the *Franz* court itself examined, is the codification of negligence per se in Kentucky Revised Statutes section 446.070.<sup>117</sup> It shouldn't matter which comes first, the statute or the common law; they can say the same thing. This should hold true especially when the very statute in question invites the use of other common law remedies.

There may also be some practical problems with the path chosen by the *Franz* court. The decision states that the issuance of a certificate of occupancy is rebuttable evidence that a defendant builder complied with the building code. However, the very nature of the defect from which subsequent purchasers need relief is such that the defect will not be

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<sup>114</sup> See *supra* note 101.

<sup>115</sup> See *supra* note 102.

<sup>116</sup> *Franz*, 885 S.W.2d at 927

<sup>117</sup> See *supra* notes 104-07 and accompanying text.

apparent at the time the inspection for the certificate of occupancy is conducted. These defects are *latent* defects, which means, by definition, they are not apparent for some time after construction and inspection. Therefore, nearly all cases brought by subsequent purchasers will involve homes for which a certificate of occupancy was issued, and all plaintiffs will begin their cases with a very significant presumption against them. The statute under which *Franz* gives subsequent purchasers of homes relief *only* gives a cause of action in the event of a building code violation. If this presumption is not rebutted, plaintiff cannot recover. It seems unnecessarily burdensome for a subsequent purchaser in Kentucky to have to start their case with the burden of production while similar plaintiffs in other jurisdictions that use negligence, an implied warranty, or strict liability, do not.

### CONCLUSION

Kentucky has, in effect, joined the majority by allowing subsequent purchasers a cause of action against the builders of their homes with the decision in *Franz*. The debate as to the means *Franz* chose to achieve these ends will rage on for years to come. Only one thing is certain: the time has come for builder responsibility, and Kentucky clearly recognized this in *Franz*. There are currently many causes of action which achieve this goal, and as many ways to justify each. Perhaps the complexity of the debate and the lack of a clear solution is best summed up by Special Justice Sue Ellen Prater, who penned a dissenting opinion in *Franz*:

In 1986, in a schizophrenic decision the New Hampshire Supreme Court refused to extend the warranty of habitability to persons not in privity with the builder. Two years later, in the well reasoned opinion that is *Lempke v. Dagenais*, the New Hampshire Supreme Court overturned its own precedent with only one dissenting vote. Today the majority opinion rationalizes its decision by blaming its inaction on the legislature. We can only hope that in the near future this Supreme Court will be presented with an opportunity to reconsider this decision. Times have changed, needs have changed, and this Court created law must change.<sup>118</sup>

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<sup>118</sup> *Franz*, 885 S.W.2d at 930-31 (Prater, Special J., dissenting).